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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
Toll Free Service Access Codes)

CC Docket No. 95-155

REPLY COMMENTS OF PAGING NETWORK, INC.

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SUMMARY

PageNet urges that the Commission adopt its proposed deadline for system software upgrades. That deadline should reduce overall implementation costs and eliminate the need for market distorting regulation of toll free numbering resources.

Those who seek protection for vanity and similar numbers have failed to demonstrate that such protection within the context of number administration would be appropriate. To the extent 800 numbers should be protected, such protection should be provided by the courts. Supplementing existing trademark and unfair competition protection within the context of number administration, would increase the complexity of such administration, increase the costs thereof, needlessly and inappropriately waste number resources, and interfere with legitimate competition.

"SAC by Service" proposals would unlawfully discriminate against PageNet and other service providers.

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Paging Network, Inc. ("PageNet"), by its attorneys, on behalf of itself and its operating subsidiaries, hereby submits its reply comments regarding the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.

I. Summary of Position

PageNet urges that the Commission adopt its proposed deadline for system software upgrades. That deadline should reduce overall implementation costs and eliminate the need for market distorting regulation of toll free numbering resources.

Those who seek protection for vanity and similar numbers have failed to demonstrate that such protection within the context of number administration would be appropriate. To the extent 800 numbers should be protected, such protection should be provided by the courts. Supplementing existing trademark and unfair competition protection within the context of number administration, would increase the complexity of such administration, increase the costs thereof, needlessly and

inappropriately waste number resources, and interfere with legitimate competition.

"SAC by Service" proposals would unlawfully discriminate against PageNet and other service providers.

II. The Proposed February 1997 Deadline for Software Upgrades Should be Adopted.

The LECs in their comments¹ have generally opposed the Commission's tentative conclusion that "the software needed to support toll free switches in the United States should have, at a minimum, the software needed to support all toll free codes reserved by the industry in January 1995 installed by February

¹ See Ameritech Comments at 21-24; Comments of BellSouth Telecommunications, Inc. at 11-12 ("BellSouth Comments"); Comments of GTE at 5-6 ("GTE Comments"); National Telephone Cooperative Association at 2-3 ("NTCA Comments"); Nynex Comments at 6; Comments of the Organization for the Protection and Advancement of Small Telephone Companies at 8-10 ("OPASTCO"); Comments of Pacific Bell and Nevada Bell at 7-8 ("Pacific Bell Comments"); Comments of the Southern New England Telephone Company at 3 ("SNET Comments"); Comments of Southwestern Bell Telephone Company at 14-15 ("SWB Comments"); Comments of the United States Telephone Association at 10-12 ("USTA Comments"); Comments of US West Communications, Inc. at 15-16 ("US West Comments"). But see Comments of Bell Atlantic at 6 ("Bell Atlantic Comments").

1997."² Their objections are not based on technological infeasibility. At most they question whether vendors will supply the needed software upgrades within the required time frame.³ The primary concern expressed by most, though, is the cost of an immediate upgrade of the network to accommodate all currently designated toll free access codes.⁴ Closely related to that is a concern that a specific deadline will adversely affect their bargaining position with their vendors.⁵

PageNet doubts that the Commission's proposed deadline will increase the overall costs of the required upgrades. It firmly believes, moreover, that the benefits of making the required investment now, rather than on a code-by-code basis, will far outweigh any possible increased costs that might in fact occur.

While compliance with the proposed deadline may require a larger initial investment, PageNet believes that an immediate upgrade of the PSTN to accommodate all of the designated codes will result in a lower overall cost than would be true if the upgrades were to be made on a code-by-code basis. This is because PageNet believes that code-by-code upgrades will require a large element of repetition in the development and implementation work

² In re Toll Free Service Access Codes, Notice of Proposed Rulemaking, FCC 95-419, CC Docket No. 95-155 at ¶29 (Released October 5, 1995).

³ See e.g. Ameritech Comments at 21-22; SWB Comments at 14.

⁴ See BellSouth Comments at 12; GTE Comments at 5; Nynex Comments at 6; OPASTCO Comments at 9; Pacific Bell Comments at 8; SNET Comments at 3.

⁵ See e.g. SNET Comments at 3; SWB Comments at 15.

required for each new software release that a one time upgrade would either eliminate or greatly reduce.

Much more importantly, however, compliance with the Commission's proposed deadline would greatly reduce the need for regulation in the administration of toll free SAC number resources. Industry knowledge that there is a ready supply of approximately 64 million toll free numbers available for assignment would permit market forces to govern their allocation. That would eliminate the need for some of the potentially market distorting regulations under consideration here, such as attempts to encourage artificially the use of PIN technology, escrow deposits and excessive constraints on number reservations. The elimination of such distortion can be expected to foster a more competitive environment and thus better serve the Commission's goals of encouraging "the introduction of new technologies, the modernization of the nation's telecommunications infrastructure, and the offering of new services."⁶ In short, any additional costs that the LECs will incur in order to comply with the Commission's proposed February 1997 deadline -- and its not clear that over the long run there will be any -- should be more than offset by the benefits of increased competition. That is the necessary bottom line in assessing the reasonableness of any investment in infrastructure required to make markets work.

LEC claims that they may be unable to meet the Commission's proposed deadline, moreover, must be viewed with a significant

⁶ Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois, 10 FCC Rcd 4596 at ¶13 (1995) ("Ameritech Order").

degree of skepticism. LEC's universally enjoy a local competition monopoly. That obviously gives them incentives to resist infrastructure investments that, as here, will contribute to the erosion of their market domination.

The Commission, consequently, should adhere to its proposed deadline.

III. Number Administration Should Not Include Vanity Number Protection

PageNet adamantly opposes the protection of vanity or any other numbers within the context of telephone number administration.⁷ Advocates of such protection have wholly failed to demonstrate that such protection is appropriate.

A. The Principle That Numbers Are a Public Resource Should Be Preserved.

The Commission has long and wisely held that telephone numbers are a public resource that are to be administered -- not owned -- by carriers.⁸ That principle has also been embodied in the industry guidelines that govern 800 number administration.⁹

⁷ This would included what the Direct Marketing Association describes as "branded numbers". Comments of Direct Marketing Association at 9 ("DMA Comments"). Those are numbers that "do not carry an acronym but are closely associated with the subscribers business or use of the number". Id.

⁸ See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order, 59 Rad. Reg. (P&F) 1275, 1284 (1986).

⁹ Industry Guidelines for 800 Number Administration, §2.2.1 (June 8, 1995) ("Industry Guidelines").

Those guidelines thus specifically provide that:¹⁰

800 Numbers are not to be treated as commodities which can be bought or sold, and no individual or entity is granted a proprietary interest in any 800 number assigned.

The protection of vanity and other numbers would inappropriately violate that principle by effectively creating quasi-property rights in telephone numbers. Such rights would greatly interfere with the efficient administration of number resources and increase the costs thereof.

B. Recognizing Quasi-Property Rights Will Waste Resources and Unduly Complicate Number Administration

The recognition of quasi-property rights in toll free numbers would create a dangerous precedent that would be extremely difficult to limit. It is a precedent that is likely to limit the available supply of both toll free and non-toll free numbers and unduly complicate the administration of all number resources. If goodwill and deception are problems that should be addressed with the introduction of 888 numbers then they are problems that logically should also be addressed with the introduction of 877, 866 and so on numbers as well. Goodwill and deception, moreover, are not problems that are limited to toll free numbers. Regular non-toll free numbers can become strongly identified with a particular good or service as well. There is thus no logical

¹⁰ Id. See also Burris V. South Central Bell Telephone Company, 540 F. Supp. 905, 907-08 (S.D. Miss 1982) (Rejecting claim that LEC had arbitrarily and capriciously changed plaintiff's telephone number).

basis for limiting vanity and so called "branded" or "sensitive" number protection to the 888 code or even simply to toll free numbers. Number protection, moreover, in each additional code, whether it is toll free or not, would not logically be simply a matter of the corresponding 7-digit number in each SAC or NPA code. It would logically include every number variation with a high potential for confusion with the original number. It would also include all four digit line numbers for all central office codes where that is the vanity or branded number. The line portion of the main number for most, if not all, Hyatt hotels, for example, is 1234. Number protection will, therefore, open Pandora's box.

Even if vanity number and similar claims could be rationally limited to toll free numbers, moreover, the adverse impact on available number resources of recognizing those claims would still clearly be significant. According to a survey conducted by the SMS/800 Number Administration Committee ("SNAC"), 24 percent of all 800 number holders regard their 800 number(s) to be a vanity number, or one that otherwise should be protected from duplication.¹¹ The same percentage said that they would in fact want such protection from 888 SAC number duplication.¹²

¹¹ Comments of the Service Management System/800 Number Administration Committee of the Ordering and Billing Forum at 17 & Attachment B thereto ("SNAC Comments").

¹² Id. The SNAC survey results effectively refute the 800 Users Coalition claim that "sensitive" number protection, which would include vanity numbers and what DMA describes as "branded numbers, would only require the protection of 5-6 percent of all toll free numbers. 800 Coalition Comments at 15-17. Even the 5-6 percent figure, though, is clearly a

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The Direct Marketing Association's claim that a right of first refusal will not waste number resources, moreover, is plainly wrong.¹³ That claim is based on the notion that any numbers duplicated as a result of an exercise of any such right will be used. Such use, however, will be a waste of the duplicate number. This is because any holder of an 800 number can increase the capacity of its existing number to handle simultaneous calls to that number simply by adding more trunk lines. There is thus no need to add additional toll free numbers in order to add to the capacity of an 800 number and it cannot be said that a use of duplicate toll free numbers will serve any purpose other than the protection of the 800 number holder.

C. Number Administrators Should Not Determine the Extent To Which Vanity and Other Numbers Deserve Protection.

There is no reason why vanity number and similar issues should be addressed in the context of number administration. Those are issues that are already and more appropriately addressed under trademark and unfair competition law. Supplementing the protection already available under those laws here would simply increase the costs of number administration, complicate it, waste number resources, and potentially interfere with competition.

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substantial quantity of number resources.

¹³ See DMA Comments at 15 ("DMA Comments").

Some advocates of number protection suggest that the scope of judicially available number protection is inadequate.¹⁴ In their view any number that is heavily promoted should be protected, and they complain that the trademark and unfair competition laws do not provide that degree of protection. Protection that broad, however, would be wholly inappropriate and would unduly interfere with legitimate competition.¹⁵ A blanket right of first refusal, for example, would give the holder of 1-800-LAWYERS the right to prevent the use of the 888 and subsequent SAC counterparts of that number even if the 800 holder did not compete geographically with those who wish to use those counterparts. Numbers should be protected only where such protection serves some other societal interest, such as the prevention of consumer confusion as to the source of goods and services as provided under the trademark laws.¹⁶ Any broader protection would be clearly inappropriate.

In point of fact, however, the scope of existing number protection under the trademark laws is, if anything, itself overly broad. Some courts thus protect even generic numbers which is inconsistent with the ordinary scope of trademark protection and

¹⁴ See Comments of the 800 Users Coalition at 21-22 ("800 Coalition Comments"); Comments of the Weather Channel, Inc. at 8-9 ("Weather Channel Comments").

¹⁵ See generally Fletcher & Kera, "The Forty-Third Year of Administration of the Landham Trademark Act of 1946," 80 Trademark Rep. 591, 675-76 (1990); Smith, "Telephone Numbers That Spell Generic Terms: A Protectable Trademark or an Invitation to Monopoly?", 28 U.S.F. L. Rev. 1079 (1994) ("Smith").

¹⁶ See Smith, supra n. 15.

broader than that scope.¹⁷ Those parties who cite a split in the circuits as a justification for supplemental protection here are thus being disingenuous.¹⁸ No court has ever held that numbers cannot be protected under traditional trademark standards and no court has ever held that unfair competition laws cannot be invoked to deal with truly unscrupulous and unsavory conduct.¹⁹ The only point on which the courts have differed among themselves has been as to whether generic numbers can be protected.²⁰ It is thus clear that the courts will protect numbers where such protection is in fact appropriate and perhaps in some instances even when it is not. Protection advocates are simply wrong when they seek to protect numbers indiscriminately even where such protection would not be in the overall public interest.

Contrary to their views, one should not be entitled to such protection simply because one has invested in the promotion of a number even where that investment is substantial. As noted above, the Commission has long made it clear that numbers are a public resource to be administered -- not owned -- by carriers. An

¹⁷ See Dial-A-Mattress Franchise Corp. v. Page, 880 F.2d 675 (2d Cir. 1989). Compare Dranoff-Perlstein Associates v. Sklar, 967 F.2d 852 (3rd Cir. 1992); Smith, supra n. 15.

¹⁸ See 800 Coalition Comments at 22; Comments of the Weather Channel, Inc. at 8-9;.

¹⁹ In American Airlines v. A 10800 A-M-E-R-I-C-A-N Corporation, 622 F. Supp. 673, 686 (N.D. Ill 1985), for example, the court entered a preliminary injunction against the defendant's effort to divert plaintiff's business based on both trademark infringement and state deceptive trade practices law.

²⁰ Compare Dial-A-Mattress Franchise Corp. v. Page, supra n. 15, with Dranoff-Perlstein Associates v. Sklar, supra n. 15. See also Smith, supra n. 15.

investment in a specific number is therefore no different than an investment in the private development of public lands. It is an investment that is made at the investor's own risk. There is thus no reason why a vanity or any other number should be protected against duplication indiscriminately. A number should only be protected where the public's ordinary interest in efficient number administration is outweighed by some other consideration.

The task of distinguishing between instances where it is appropriate to protect numbers and where it is not, moreover, is one that is inappropriate for number administrators. Those determinations turn on highly subtle factual distinctions and complex policy questions.²¹ The courts have already been given the task of making those distinctions, and are far better equipped to do so. Supplementing existing trademark and unfair competition protection within the context of number administration would simply increase the complexity of such administration, increase the costs thereof and needlessly and inappropriately waste number resources.

IV. "SAC by Service" Proposals Violate the Principles of Technology Neutrality and Even Handedness Declared To Be Essential In the Ameritech Order.

The 800 Users Coalition and others urge a "SAC by Service" approach to toll free number allocations.²² These parties would reserve 800 numbers for use in telemarketing and relegate

²¹ See Dranoff-Perlstein, supra, 967 F2d at 855.

²² Comments of the 800 Users Coalition at 8-14 ("800 Users Comments").

residential and other uses to one or more other specially designated SACs. Implicit in these proposals is that non-telemarketing, and particularly low volume, uses of toll free number resources are inherently less important. This, however, is decidedly not true. Pagers, for example, are commonly used for emergency communications which can be infrequent but of vital importance when they occur. A call to the pager of ones cardiologist can be literally the most important call of ones life.

Segregating pagers or other services on specific SAC's and excluding them from further 800 assignments would ignore this reality and subject those services to call routing problems similar to, and probably greater than, those that have been experienced in connection with the opening of interchangeable area codes. As evidenced by the consumer alert issued by the Commission in May of this year, failures to upgrade PBX and other customer premise equipment has caused serious service disruption problems as those codes have been opened. The 888 SAC is also interchangeable with NXX codes and the system upgrades required to handle toll free calls are greater than those required to simply route non-toll free calls. It would thus be quite surprising if serious call routing problems do not occur with the opening of the new 888 SAC.

Also implicit in the SAC by Service proposals is the erroneous assumption that paging services are uniformly unrelated to marketing and sales. Such services, though, are often intimately related to such activities. A lawyer, for example, may

promote the use of his or her paging service in order to provide clients with better service.

The SAC by Service proposals are, moreover, wholly at odds with the principles of technology neutrality and even handedness declared by the Commission in its Ameritech Order. As the Commission there correctly observed:²³

Administration of the NANP will significantly affect the ease with which new telecommunications services and enhanced services are introduced in the future. In general, we believe that administration of the NANP must reflect sensitivity to the growth and dynamic nature of the communications industry if our regulatory goals identified above are to be realized. If it is to achieve such sensitivity, administration of the plan must seek to facilitate entry into the communications marketplace by making numbering resources available on an efficient, timely basis to communications service providers. In general, we believe that a successful administration of the NANP will not unduly favor or disadvantage any particular industry segment or group of consumers. Similarly, we believe that the administration of the plan should not unduly favor one technology over another. Thus, the NANP should be largely technology neutral.

The same principles must be applied to the administration of toll free numbers. It is impossible to anticipate how existing technology might evolve and how new technologies might compete with or supplement older technologies. The Commission's wise requirement of neutrality and even handedness in number administration is the best means by which it can assure that these changes within the telecommunications industry will occur on the basis of competitive merit rather than some artificial and distorting influence. Neutrality and evenhandedness will be best achieved by a continuation of the first come, first served

²³ Ameritech Order at ¶18.

principle that the Commission reaffirmed in its Ameritech Order wherein the Commission declared unlawful the kind of discriminatory segregation and exclusion that the 800 Users Coalition and others have proposed here.

There are a number of respects in which the kind of discrimination proposed would likely distort competition and create entry barriers. One is the call routing problems that will inevitably be experienced when the new 888 SAC is first opened. Another is the marketing implications of forcing one industry segment to use an unfamiliar code.²⁴ This will be particularly troublesome with the opening of the 888 code in light of the need to educate the public that 800 is no longer the only toll free code.²⁵

In addition, SAC by Service would be inconsistent with the Communication Act's prohibitions against discrimination in service classifications²⁶ and would be difficult, if not impossible, to enforce. The 800 Users Coalition, for example, proposes that 800

²⁴ See Comments of Vanity International at 3 ("From a marketing standpoint, if an 800 number is on main street, an 888 number will be a second avenue address.")

²⁵ Contrary to the contention of the 800 Users Coalition, attempts to categorize SAC assignments on the basis of service categories will not reduce caller confusion. See 800 Coalition Comments at 10. Indeed, it will increase such confusion. The reason for this is the fact that it is becoming increasingly more difficult to classify telecommunication services as they become more complex and integrated. PageNet, for example, offers a voice mail service that competes directly with wireline voice mail services. The wireline services, like the wireless services, use paging to alert the wireline customer that he or she has received a message.

²⁶ See 47 U.S.C. §§201(b) & 202(a).

SAC use be limited to "call center, sales, customer service, and technical support applications."²⁷ It is unclear, however, how one would classify a sales person who operated out of his or her own home under this proposed limitation. If one concluded that the customer's use in that instance was primarily residential and refused to assign that person an 800 number, would the customer be able to claim that this was an unreasonable classification that placed him or her at a competitive disadvantage vis-a-vis competitors who operate out of commercial office space. Moreover, how would the service provider be able to assure that the customer had properly represented his or her intended use of the number? So called "telecommuting", where people work out of their own homes through the use of telecommunications, is becoming increasingly commonplace. Circumvention of the classification would thus likely be frequent and difficult to detect. Thus even if the 800 Users Coalition's proposed classifications would themselves arguably be "reasonable", which they clearly would not be, likely widespread circumvention of those classifications would clearly result in de facto unreasonable classifications.²⁸

²⁷ 800 Coalition Comments at 9.

²⁸ Southwestern Bell Telephone Company ("SWB") inappropriately contends that paging carriers "should not be allowed to tie up huge banks of toll free numbers . . . , when no specific customer, other than the paging company itself, exists for each number." SWB Comments at 7-8. It is clear that SWB simply does not understand the nature of the paging services offered by PageNet and other paging carriers and the public demand for those services.

PageNet offers its customers integrated paging and voice mail services. A new subscriber is thus assigned a paging service, with or without a pager, which already includes a telephone number. When he or she terminates his or her

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V. Conclusions

PageNet strongly believes that the Commission's primary role in the administration of toll free number resources should be to assure that software and other system upgrades are made on a timely basis. This will assure that already and future designated number resources are made available on a timely basis. PageNet further believes that the Commission, as it was in Ameritech Order, must be vigilant to the need to assure that the administration of toll free number resources will be as technology neutral and even handed as possible. For the most part, though, it should be possible to achieve this goal by permitting the

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service, that service, complete with its number, is simply reassigned to another subscriber. The number is thus, unlike other telecommunications services, ancillary to the service itself rather than a specific subscriber. It is simply an ingredient of the service packages offered by PageNet much like sugar is an ingredient in a cake.

To require paging carriers to identify subscribers in advance of a toll free number assignment would simply make the distribution of paging services more inefficient without in any way advancing the objectives of the Commission's proposed regulations. It would thus interfere with a paging carrier's ability to provide a subscriber with service immediately as the carrier would not be able to activate service until it had obtained a number from its Resp Org. This delay in the implementation of service would not only be inconvenient for the subscriber, it would serve no useful purpose. Currently the demand for 800 numbers in conjunction with paging services is so great that PageNet has a subscriber waiting list. Paging carriers thus do in fact have "customers" for each number that they are assigned, and identifying those customers by name would simply add pointless paperwork to the process of initiating paging service.

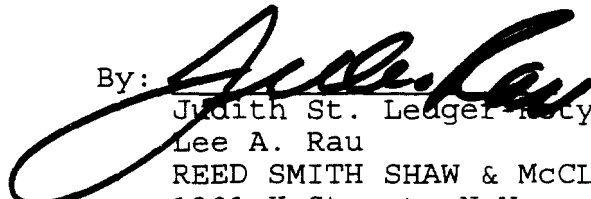
In reality the bundled nature of paging service makes the paging carrier the "customer" for number resource allocation purposes, and they should be so treated under the proposed regulations. A failure to do so will simply create needless inefficiencies.

industry to resolve number resource issues in the first instance on a consensus basis. It should thus be possible to limit the Commission's ongoing role in toll free number administration to dispute resolution. Indeed, PageNet strongly believes that it would be counterproductive for the Commission to attempt to micro-manage number administration.

Respectfully submitted,

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